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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	CR 08-0160 -SI
Plaintiff,	)	
v.	)	UNITED STATES MOTION AND
	)	PROPOSED ORDER TO A
	)	SET TRIAL DATE
JOHN JOSEPH COTA,	)	
Defendant.	)	
	)	
	)	

The United States, by and through the undersigned attorneys, hereby moves this  
 Honorable Court to set a trial date in the matter of *United States v. John Joseph Cota*

1 CR 08-0160-SI or, in the alternative, set this matter on for hearing no later than May 30,  
2 2008, at 11:00 a.m. The United States has filed a separate motion requesting an expedited  
3 hearing date.

4 **I. Background**

5 Defendant John Cota, a San Francisco Bar Pilot, is charged with negligently  
6 causing the discharge into San Francisco Bay of over 50,000 gallons of oil from the *M/V*  
7 *Cosco Busan* on November 7, 2007, as well as other charges.

8 The crew of the *Cosco Busan* are Chinese nationals. The ship's master and five  
9 crew members have remained in San Francisco since the incident and have been formally  
10 held in the Bay Area as material witnesses since January 3, 2008. *See In re Material*  
11 *Witness Warrants*, CR 07-09552 MISC VRW (JCS). On April 1, 2008, five of the six  
12 material witnesses moved for depositions pursuant to Rule 15 of the Federal Rules of  
13 Criminal Procedure and for their release. The material witness matter is now assigned to  
14 Magistrate Judge Spero who has ordered that depositions of three of the six material  
15 witnesses (Kong Xian Hu, Liang Xian Zheng, and, Shun Biao Zhao) take place starting  
16 on May 29, 2008, and the deposition of the remaining three witnesses take place starting  
17 the week of August 11, 2008.

18 The parties are scheduled to appear next before this Court on July 18, 2008, for a  
19 hearing on motions. Forty-four days remain on the speedy trial clock. Currently, time is  
20 excluded until July 18, 2008.

21 **II. Argument**

22 The United States would like to secure the material witnesses's testimony at trial.  
23 If the witnesses are unavailable, the United States will move to admit their depositions  
24 pursuant to Federal Rules of Criminal Procedure (FRCP) Rule 15. These depositions are  
25 generally only admissible at trial if the witness is unavailable. *See* FRCP Rule 15(f) and  
26 Federal Rules of Evidence (FRE), Rule 804. A witness is deemed unavailable if the  
27 party seeking to admit the testimony is unable to "procure the declarant's attendance . . .  
28 by process or other reasonable means." FRE 804(a)(5). A government witness will not be

1 deemed unavailable unless the prosecutors acted in good faith and “operate[d] in a  
2 competent manner” in attempting to procure the witness. *See United States v Yida*, 498  
3 F.3d 945, 952 (9<sup>th</sup> Cir. 2007).

4 The United States would like to serve trial subpoenas on the material witnesses.  
5 Here it is expected that the material witnesses will seek to leave the country upon the  
6 completion of their Rule 15 depositions making service of process difficult. Serving the  
7 material witnesses once they leave the country will be difficult not only because the  
8 witnesses will be in a foreign country, but also because these witnesses are seamen who  
9 spend several months a year absent from their home country sailing the high seas. Thus,  
10 the United States would like to serve these witnesses with trial subpoenas **before** they  
11 leave the country. The United States believes that the first deposition will be completed  
12 on May 29, 2008.

13 The United States cannot serve these witnesses with a trial subpoena absent a trial  
14 date. Hence the United States respectfully asks that the Court set a trial date so that these  
15 witnesses can be served with a trial subpoena before their departure from the United  
16 States.

17 The United States suggests a trial date of September 1, 2008. Currently there are forty-  
18 four days left on the speedy trial clock and time is excluded until July 18, 2008. Hence, a  
19 trial must commence by September 1, 2008. Defense counsel has informed government  
20 counsel that he is still reviewing discovery and is not ready to set a trial date.

21 The United States has spoken to Jonathan Howden, counsel for witnesses Kong  
22 Xian Hu, Liang Xian Zheng, and, Shun Biao Zhao. According Mr. Howden he will not  
23 accept formal process after the witnesses leave the country, because it would extend the  
24 jurisdiction of the Court beyond the United States. However Mr. Howden represented  
25 that once the witnesses leave the country, he will facilitate communication with these  
26 witnesses and work to ensue their presence at trial. In addition he will work to ensure that  
27 the witnesses are personally served before they leave the country, provided that service  
28 happens shortly after the completion of their depositions.

### III. Conclusion

1 For the reasons set forth above, the United States respectfully requests that the  
2 Court set a trial date of September 1, 2008, or in the alternative set this Motion on for  
3 hearing on May 30, 2008 at 11 a.m. or earlier.

4 Respectfully submitted,

5  
6 JOSEPH P. RUSSONIELLO  
United States Attorney

7 BRIAN J. STRETCH  
8 Chief, Criminal Division

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Assistant Attorney General  
Environment and Natural Resources  
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9  
10 By: S/S  
11 JONATHAN SCHMIDT  
Assistant United States Attorney

By: S/S  
RICHARD A. UDELL  
Senior Trial Attorney  
Environmental Crimes Section

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13 DATED: May \_\_, 2008 \_\_\_\_  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	CR 08-0160 SI
Plaintiff,	)	[Proposed] ORDER SETTING A TRIAL
v.	)	DATE
JOHN JOSEPH COTA,	)	
Defendant.	)	
	)	
	)	
	)	

Based on the Motion of the United States, the Court hereby sets a trial date in this matter of September 1, 2008.

SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
HONORABLE SUSAN ILLSTON  
United States District Court Judge